IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3153 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ISHWARBHAI H PATEL

Versus

STATE OF GUJARAT

Appearance:

MR PM THAKKAR for Petitioner

MR SP HASURKAR for Respondent No. 1

M/S PATEL ADVOCATES for Respondent No. 2

NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 1/02/2000

CAV JUDGEMENT

Mr.Niraj Ashar, Learned Advocate appearing for Sr. Advocate Mr.P.M.Thakkar on behalf of the petitioner. Learned AGP Mr.V.M.Pancholi appears for M/s. Patel

Advocates on behalf of the respondent no.1 and 2. The respondent no.3 is served but none is appearing on behalf of the respondent no.3.

2. In the present petition, according to the petitioner he was initially appointed by the respondents by an order dated 2.3.1981 as a Jr.Clerk in the pay scale of Rs.260 to Rs.400/- and was posted at Mahesana under the Director of Accounts and Treasury. Thereafter the petitioner was transferred to Unja District Mahesana on request in the month of May, 1981. During the employment, the petitioner had received 2 chargesheets for some alleged irregularities in his duties, wherein the respondent no.3 ultimately by an order dated 16.4.86 imposed penalty by way of disciplinary proceedings against the petitioner by withholding one increment for one year with future effect and in respect to the other incident dated 4.4.85, the respondent no.3 has imposed punishment to the petitioner by placing the petitioner in the lowest pay scale of Rs.260/- for a period of 5 years.

3. Thereafter, it appears from the record that the petitioner had received a third chargesheet dated 6.2.1987 interalia alleging therein that the petitioner had remained absent on 9.10.86 & 9.12.86 and after alleging in the chargesheet that on 15.12.1986, the petitioner had attended the office at 11:40 hours instead of 11:00 hours and also alleged that carelessness in performing regular work of his table and thereby the petitioner had committed misconduct which is unbecoming of a Government servant. In the said chargesheet, the fact of earlier 2 punishments imposed by the respondent no.3 against the petitioner has been mentioned. The said chargesheet is dated 6.2.1987 (Annexure A) Page 20 to the petition. In the said chargesheet, it is also mentioned by the authority that if the allegations made in the chargesheet are ultimately found to be proved then earlier 2 punishments imposed on the petitioner were required to be considered at the time of imposing punishment. The petitioner gave reply on 7.2.87 (Annexure D) Page 25 and pointed out that the said chargesheet has been issued with a prejudice and with malafide intention and ultimately the intention of the authority is to dismiss the petitioner from service and having being prejudiced, there is no necessity to give any representation or reply to the competent authority. The District Treasury Officer, Mahesana has ordered on 5.2.87 that there was some prima facie case against the petitioner for departmental inquiry in respect of wilful absence from duty, disobedience, ill-subordination and misconduct and therefore it was ordered by the District

Treasury Officer, Mahesana that departmental inquiry against the petitioner in respect to the above misconduct is required to be initiated. After the reply filed by the petitioner dated 7.2.1987, the departmental inquiry was initiated against the petitioner. Inspite of receiving the call letters from the competent authority, the petitioner was not remained present in the departmental inquiry and ultimately exparte departmental inquiry was initiated against the petitioner and in absence of the petitioner 4 witnesses were examined in the departmental inquiry and after considering the exparte evidence laid in the departmental inquiry , the Inquiry Officer has come to the conclusion that misconduct alleged against the petitioner are found to be proved and also considered the earlier 2 punishments imposed by the Competent Authority to the petitioner. Therefore, the show cause notice was issued to the petitioner as to why he should not be dismissed from service by show cause notice dated 30.4.1987. The Competent Authority had issued show cause notice dated 30.4.87 to the petitioner and alongwith the said show cause notice, the report of the Inquiry Officer was sent to the petitioner. After receiving the show cause notice by the petitioner, the petitioner had submitted the detailed reply to the competent authority which is at Annexure E (Page 38) of the petitioner. Thereafter, the Competent Authority after considering the reply filed by the petitioner and considering the earlier 2 punishment imposed against the petitioner, respondent no.3 has passed dismissal order dated 26.6.1987.

4. The petitioner has challenged the dismissal order in SCA No. 4950 of 1987 before this Court which ultimately came to be withdrawn without entering in the merits of the matter in view of the fact that contention was taken by respondent no.3 in his affidavit in reply dated 6.11.87 that the termination order dated 26.6.87 has already been challenged by way of departmental appeal before the respondent no.2 and said departmental appeal is pending before the respondent no.2 and therefore the petitioner is not entitled to approach this Court. Thereafter, the respondent no.2 has decided the departmental appeal by order dated 10.2.88 and rejected the said appeal coming to the conclusion that the punishment of dismissal which has been imposed by the competent authority is quite just, reasonable and proper and there was no justification to interfere with such punishment.

5. In the present petition, the petitioner has challenged both the orders dated 26.6.87 i.e. dismissal

order and appellate order dated 10.2.88. The contention which has been raised by the petitioner in the present petition are that both orders are bad in law, illegal and in violation of principles of natural justice and also suffering from the vice of malafide and personal bias. It was further contended by the petitioner that in the past, the petitioner was victimised by the competent authority for no fault on his side. According to the petitioner, that in present case the penalty of dismissal was imposed by the respondent no.3 on the ground that petitioner remained absent for one day on 2 occasions and on one occasion, the petitioner had attended the office at 11:40 hours. Therefore, the petitioner submitted that remaining absent on one day on 2 occasions cannot be said to be grave misconduct which requires termination of the services of the petitioner and therefore prima facie, the termination order is passed to victimise and it was passed with a view to satisfy the ego of the respondents. It was further contended that the competent authority having a serious prejudice against the petitioner and therefore there was no meaning to submit any reply to appear in the departmental inquiry. Even though the departmental inquiry was initiated exparte against the petitioner in violations of principles of natural justice mentioning the fact of earlier 2 punishments in the chargesheet itself show the prejudice and prejudge the issue by the competent authority and also pointed out that mandatory provisions of Gujarat Civil Services (Disciplinary and Appeal Rules), 1971 Rule 9 (5)(a)(b) and (c) have not at all been complied with by the Authority before ordering to hold the inquiry. In the departmental inquiry no Presenting Officer was appointed by the Authority. It was also contended that before giving reply to the chargesheet on 5.2.1987, the Competent Authority has decided to hold the inquiry against the petitioner which amounts to malafide and personal bias of the respondent no.3 against the petitioner. It was also contended by the petitioner that before passing the final punishment order against the petitioner, the detailed reply of the second show cause notice was not considered by the Competent Authority & the Appellate Authority has also not considered the detailed reply of the show cause notice and submissions made in the appeal. The order passed by the Appellate Authority is also not speaking order and it suffers from non-application of mind. In the said petition, the Rule has been issued by this Court on 24.6.1988 made returnable on 22.8.1988. Rule has been served to the respondent no.1 to 3 but no affidavit in reply has been filed by any of the respondents in the present petition. The Learned Advocate Mr.V.M.Pancholi, AGP appears on

behalf of the respondent no. 1 & 2 and noone is appearing on behalf of respondent no.3 though rule was served upon respondent no.3.

6. Learned Advocate Shri Niraj Ashar appearing on behalf of the petitioner has submitted that prima facie looking to the misconduct in question itself and considering the reply of the show cause notice given by the petitioner at Annexure E Page 38, the punishment of dismissal is harsh, unjustified, arbitrary and based on prejudice as well as personal bias of respondent no.3 authority. The Learned Advocate on behalf of the petitioner submitted that the petitioner remained absent for 2 days in a period of 2 months i.e. 9.10.86 and 9.12.86. The petitioner gave reply of show cause notice wherein it was pointed out by the petitioner that on 9.10.86 he was not well and therefore he was not able to attend the duty and the same fact was informed on the next day to the Sub-Treasury Officer, Unja but there was no CL balance in the credit of the petitioner and therefore he has not given any CL Report and for one day EL or ML was not sanctioned by the department, therefore it was not possible for him to submit the report of EL or ML for one day. In respect to the second incident dated 9.12.86, the petitioner pointed out that on that day, due to unavoidable circumstances, he had remained absent and on the next day, it was orally informed to the Sub-Treasury Officer, Unja and he agreed to sanction the leave but on 15.12.86, one incident had occurred and therefore the leave was not sanctioned with prejudice against the petitioner. In respect to the incident dated 15.12.86, the petitioner had attended the office at 11:40 hours instead of 11:00 hours. The petitioner had pointed out in reply that on 14.12.86 it was Sunday and he had gone to his village and met his mother who was sick and patient of high blood pressure and her treatment was continued with hear specialist Dr.Shukla at Unja. While returning from the village on Monday i.e. 15.12.86 because the train was little late and therefore he could not attend the duty at 11:00 hours but late by 40 minutes but one Mr.Chauhan who is Oficer in Charge made certain allegations in presence of the Public in the office itself and spoken harsh words which amounted to insult of the petitioner and therefore because of the report submitted by one Mr.L.V.Chauhan, with a prejudice mind, the punishment has been imposed by the Competent Authority. The petitioner in reply submitted that there was no difficulty if the officer would have asked for the report of CL or to deduct the salary of remaining absent on 2 occasions but he was insulted by the officer in presence of the Public and other staff in the office and

therefore the petitioner made a representation against Shri L.V.Chauhan to the Sub-Treasury Officer, Unja, but no action has been taken by the Sub-Treasury Officer against said Shri L.V.Chauhan. According to the petitioner, there was no work remaining pending on his table but because of some irregularities of the peon, this difficulty has arisen. He also pointed out that during the 10 month period, he remained absent for 3 days and respondent no.3 having personal grudge against the petitioner and therefore this inquiry was initiated and ultimately dismissal order has been passed. The Learned Advocates on behalf of the petitioner further submit that the petitioner in all completed more than 5 years service as a Junior Clerk with the respondent and except 2 punishments in past there was no other punishment imposed by the authority to the petitioner. The said punishment has been imposed by the authority upon the petitioner because of some personal bias and having prejudice against the petitioner and therefore this punishment of dismissal is shockingly disproportionate, unjustified and therefore it was required to be set aside.

7. Learned Advocate Shri V.M.Pancholi, AGP is appearing on behalf of the respondent submitted that the conduct of the petitioner is such that deliberately he remained absent and his nature is not good and his behavior is also not good with the officers and similar incident occurred on 2 occasions in past wherein he was punished by the Authority. Therefore such a punishment of dismissal cannot be considered to be unjustified or shockingly disproportionate to the misconduct and Competent Authority has considered each and every aspect of the misconduct, past misconduct and also considered the reply of the show-cause notice. Therefore, the punishment order passed by the authority dated 26.6.1987 is quite legal, valid and reasonable and there is no option to the department except to pass the dismissal order against the petitioner.

8. I have considered the submissions of both the advocates. The facts remain that the petitioner remained absent for 2 days i.e. on 9.10.1986 and 9.12.1986 and also not reported in time on 15.12.86 i.e. after 40 minutes on that day. Another allegation that the petitioner has not completed his normal work inspite of instructions issued by the Officer is also found to be proved by the Inquiry Officer. In light of these facts, it is required to be considered whether the punishment of dismissal which has been imposed by the Competent Authority against the petitioner considering the past 2 incident of punishment is legal, valid, proper or not.

The main submission of the Learned Advocate of the petitioner is that because of the personal bias and prejudice, the harsh action was taken by the respondent authority. I have perused the reply of show cause notice filed by the petitioner which is at Annexure E Page 38 of the petition. The said reply is giving details of defence and explanation of the petitioner that on 2 occasions why he remained absent and on one occasion why he was present late by 40 minutes. Against this explanation and reply in the departmental inquiry there was no contrary evidence produced by the department. In the departmental inquiry, one Lavjibhai Chauhan was examined vide Exh.11. He deposed before the Inquiry Officer that on 9.10.86 and 9.12.86 without informing in advance to the officer, the petitioner had remained absent but it is also deposed by Mr.Chauhan that on 2 occasions of remaining absent on 9.10.86 and 9.12.86, the salary of that day was deducted from the salary of the petitioner and also the salary of 15.12.86 was also deducted from the salary of the petitioner. Against the said evidence of Shri Chauhan laid in the departmental inquiry, the petitioner had submitted the rely of show cause notice and gave detailed explanation and defence. The said reply was received by the Competent Authority. The Competent Authority while passing the final punishment order against the petitioner, though a detailed reply with explanation given by he petitioner was received by the Competent Authority, the same was not considered by the Competent Authority except to mention the fact that the petitioner had given reply to the show cause notice. It is the duty of the Competent authority to consider in detail the explanation and defence pointed out by the petitioner in his reply of show cause notice but the Competent Authority has not applied mind in respect to the reply of the show cause notice wherein a detailed explanation and defence was submitted by the petitioner. Looking to the documents on record and in presence of the reply, prima facie it shows that the Competent Authority was having some prejudice and personal bias against the petitioner and therefore without considering the reply of the show-cause notice and explanation tendered by the petitioner, the punishment of dismissal has been passed by the Authority. It is the duty of the Competent Authority to consider the gravity of misconduct mentioned in the chargesheet, the evidence on record and also required to consider the reply of the show cause notice submitted by the petitioner. It is not the case of the respondents that the explanation which has been tendered by the petitioner in reply of the show cause notice is not correct and false and got up and after thought. According to my

reading of the reply of the show cause notice, it is a natural reply and explanation given by the petitioner who was really disturbed due to the prejudice and victimisation of the respondent authority. The language which has been used in the reply of the show cause notice certainly appears that the petitioner was so much disturbed by the respondent authority. Looking to the reply of the show cause notice, it was not a intentional misconduct committed by the petitioner to remain absent on 9.10.86 and 9.12.86 but due to unavoidable circumstances which was natural by the petitioner in his reply and on 15.12.1986 because of the train being late, he reported late by 40 months. Even that act also does not amount to intention to commit misconduct. Therefore the punishment which was imposed by the Competent Authority against the petitioner is prima facie passed on some personal bias, grudge and victimisation.

9. There are various decision on this point rendered by this Court and the Apex Court that in the case of remaining absent for one or 2 days by the employee whether the punishment of dismissal is justified or not or whether it is disproportionate or not? This question has been examined by this Court in a reported decision in 1987 LAB IC 685 in the case of Vijaykumar Muljibhai Jasani Vs. GSRTC.

> "4. Even though the Labour Court had come to the conclusion that dismissal from service is deprivation of bread and for such type of trivial misconduct, it was unreasonable and excessive, it imposed another excessive and unreasonable punishment. The Labour Court has rightly observed that the Corporation has not considered as to why lesser punishment should not be passed against the workman. However, the Labour Court itself fell into an error in not considering the alternative lesser punishment. There is a total non-application of mind on the part of the Labour Court in directing the respondent Corporation that refusal of 50% back wages is sufficient punishment, without considering as to why that 50% would amount to. The monthly wages of the workman are about Rs.1600/- including dearness allowance and other allowances. He was dismissed from service on 15th November, 1980 and was actually reinstated on 15.4.1984. Thus he was out of service for more than 3 & 1/2 hears. The total wages for this period would be running into a very large amount and even denial of 50% of the backwages would run into several thousands of

rupees.The Labour Court does not appear to have realised as to what the substituted punishment would really amount to. For such a trivial misconduct of absence of two days the punishment should not have resulted into such a severe amount of find of several thousands of rupees. The Labour Court has rightly observed that the Corporation has not considered as to what lesser punishment than dismissal should be given. The Labour Court has also observed that the workman is an old servant of the Corporation and he should not be deprived of his bread and for such an act of misconduct. However, the Labour Court has itself deprived of his bread for such an act of misconduct. However, the Labour Court has itself deprived the workman of his bread for a very long period and a very large amount disproportionate to the misconduct of the workman.

5. In the case of Sardarsingh Devisingh v. District Superintendent of Police, Sabarkantha District, 1985 (2) 26 Guj LR 1368 this Court had considered the question of reasonableness and rationality of punishment of proportion to the misconduct. In para 6 of that judgment, the learned Judge (Ahmadi, J) has observed as under:

" When an authority is conferred with the power to inflict one of the several penalties such as caution or censure, reprimand, extra drill or duty, fine, stoppage of increments, reduction in rank, removal or dismissal, it is obvious that the authority must give a serious thought to the question of choice of penalty. The choice cannot be arbitrary but must depend on the nature of misconduct established in a given case. Just as a road roller cannot be brought to crush a fly, so also the extreme penalty of dismissal cannot be inflicted for misconduct which is not equally grave. The consequences of removal or dismissal from service are severe, sometimes the entire family is ruined because another job or work may not be easy to find and, therefore, it is all the more necessary that the punishment of removal/dismissal should be invoked sparingly and in cases which can be

described as gross, such as, receiving or defalcation of public funds, behavior which is morally reprehensible, gross abuse or misuse of authority, etc. However, is a policeman remains absent without leave, it certainly has an adverse effect on the disciplined force which can be remedied by imposing a lighter penalty such as withholding of increments or the like."

In the present case we find that the punishment of refusal of 50% back-wages which actually runs into several thousands of rupees is disproportionate to the misconduct of the workman, which is very minor and which could not have been attracted any major penalty. No reasonable persons could have imposed a penalty or fine of several thousands of rupees or dismissal for remaining absent for two days and negligence. In the case of Jitendra Singh Rathor (1984 Lab IC 554) (supra) the Tribunal had directed reinstatement of the workman with half backwages and the employer had approached the High Court under Art. 227. The High Court vacated the order of reinstatement holding that the ends of justice would be served by directing payment of compensation quantified at Rs.15000/-. This modification of the High Court was assailed before the Supreme Court at the instance of the workman. In that case the Supreme Court observed that the workman is ordinarily entitled to full back wages unless for any particular reason the whole or a part of it is asked to be withheld. In the present case there is no particular reason shown to withhold 50% of the back wages which run into several thousands of rupees as punishment for a very minor misconduct. Such a minor misconduct could be punished only with a minor penalty like withholding of one or two increments without cumulative effect. The cumulative effect is also many a time not given proper consideration. Cumulative effect has the effect over the entire service career of the workman and there is permanent loss, and at the end of the service the cumulative loss would run into a very large figure and it would also affect the pensionary benefits. The punishment of stoppage of increments with cumulative effect is to be imposed after careful consideration and application of mind to be the resultant total

consequence.

6. In view of the misconduct, here of absence from duty for two days and negligence, the maximum penalty that could have been imposed by any reasonable employer could not have been more than stoppage of two increments without cumulative effect, especially in view of the fact that the past record of the workman was not bad and he has good service record of 9 years and also a long service to go.

7. In view of the aforesaid discussions, we quash and set aside the award of the Labour Court in so far as the Labour Court has refused 50% back wages as sufficient punishment. We, therefore, hold that the workman is entitled to reinstatement with continuity of service with full back wages, but he is required to be punished by imposing on him penalty of stoppage of two increments without cumulative effect."

Similarly, the Apex Court had an occasion to consider the very same question in reported decision AIR 1994 SC 215 in the case of Union of India & Others Vs. Giriraj Sharma. The Apex Court held in Para 2 that:-

"2. Mr.Jain the learned counsel for the appellant Union of India contended that the interpretation placed on Section 11(1) of the Central Reserve Police Force Act, 1949 (hereinafter called "the Act") is not correct and it is on account of this erroneous understanding of the provision that the High Court quashed the order of dismissal. In support of his contention he invited our attention to a decision of the Rajasthan High Court reported in AIR 1965 Raj 140. He also relied on certain other decisions but it is sufficient to state that according to him the learned Judges of the High Court had committed an error in interpreting the said sub-section. In our opinion it is not necessary for us to construe sub-section (1) of Section 11 of the Act in the backdrop of the facts of the present case. Assuming Mr.Jain is right, we are of the opinion that so far as the present case is concerned the allegation is in regard to the incumbent having over-stayed the period of leave by 12 days. The incumbent while admitting the fact that he had over-stayed the period of leave

had explained the circumstances in which it was inevitable for him to continue on leave as he was forced to do so on account of unexpected circumstances. We are of the opinion that the punishment of dismissal for overstaying the period of 12 days in the said circumstances which have not been controvered in the counter is harsh since the circumstances show that it was not his intention to wilfully flout the order, but the circumstances force him to do so. In that view of the matter the Learned Counsel for the respondent has fairly conceded that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was no called for. We agree with this submission."

Recently, the Apex Court has decied the very same question in a reported decision in 1999 SC Page 666 Saiyed Jahirhusain V. Union of India & Others and has held in Para 4 that:-

"4. In our view, in the facts and circumstances of the case, the punishment of dismissal from service is too harsh and on the contrary, it is required to be substituted by an appropriate lesser punishment. Learned counsel for the respondents after instructions has stated that an apporpriate lesser punishment may be awarded by the Court. It will be acceptable to the respondents. In our view, the ends of justice will be served if we set aside the order of dismissal of the appellant and instead direct reinstatement of the appellant in service with continuity and with all other benefits save and except withdrawing 50 per cent of back wages from the date of dismissal, i.e. 11.10.1988 till today. In our view, this punishment which will involve a substantial monetary loss to the appellant will meet the ends of justice and will be a sufficient corrective measure for the appellant. The request of learned counsel for the respondents that two future increments may also be withheld without cumulative effect does not appear to us to be justified on the peculiar facts and circumstances of the case. In our view, the aforesaid monetary loss to the appellant will meet the ends of justice so that he may be careful in future. It is ordered accordingly."

In another similar case reported in J.T. 1995(8) SC Page 445, in case of Mandeep kumar etc. Vs. State of Haryana & Anr wherein the Apex Court held that dismissal from service, absence from duty for 2 days without leave is a marginal lapse on the part of the employee and therefore fresh opportunity to be given to improve performance and result thereto to the reinstatement in service subject to condition that if appellants absent themselves from duty without leave even on a single occasion during the next 2 years their services may be discharged.

In the present case, there was also an allegation that the petitioner has misbehaved with the Officer. In such circumstances, the reported decision in JT 1995 (7) SC Page 43 in the case of Ramkishan Vs. Union of India & Others, the Apex Court held that when abusive language is used by anybody against the Superior it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of the abusive language and no straight jacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts. What was the nature of the abusive language used by the appellant was not stated. In the present case, in the charge sheet dated 6.2.87, the allegations levied against the petitioner that inspite of repeated instructions given to the petitioner he has not obeyed the orders of the Superior and that to misbehaved with Officer by not obeying the directions issued by the Officer but in entire inquiry and proceedings and relevant documents, the respondents has not produced any material on record that what was the nature of such language used by the petitioner against the superior. Therefore, considering the view of the Apex Court, the said allegations of not to obey the order of the Superior is not proved and by imposing the punishment the said misconduct has been also considered by the Authority against the petitioner is not proper.

There is another decision of the Apex Court reported in JT 1995 (6) SC Page 152 where, the Security Guard remained absent for short period from duty. According to the Apex Court, the punishment awarded to the appellant is no doubt severe and disproportionate and same deserves to be set aside.

There is one another decision of Apex Court reported in 1998 AIR SC Weekly Page 4010, wherein a Police Constable remained absent for one day on hunger

strike for opposing his transfer and department had passed a dismissal order against him which ultimately was found by the Apex Court that punishment of dismissal from service granted to Police Constable who remained absent for one day on hunger strike for opposing his transfer would not be proper and he was directed to reinstate in service with only 50% back wages with a direction to file written apology for what he had done on the fateful day and also asked to give undertaking that he would be transferred to any place to which he is ordered to be transferred by the Competent Authority.

In case of Tulsidas Vs. Union of India & Others reported in 1997 LAB IC Page 2494, wherein the Rajasthan High Court has considered the question that before passing the dismissal order, the reply of the show cause notice was not considered by the Competent Authority. The Court has considered that if the reply to the show cause notice is not to be considered than what was the need to issue show cause notice. The purpose behind issuing show cause notice is to give full opportunity to the petitioner to satisfy the authority to exogenerate him and not to award any punishment. Therefore, the Rajasthan High Court has come to the conclusion that bare reading of the impugned order shows that the disciplinary authority has neither referred to the reply to the show cause notice nor dealt with the same in the order. Thus the impugned order was in clear violation of the principles of natural justice and liable to be set aside. In the present case before this Court, no doubt the Competent Authority has mentioned the fact of filing the reply by the petitioner against the show cause notice but except that the Competent Authority has not discussed what was the explanation given by the petitioner against show cause notice and not applied the mind to the defence of the petitioner and without considering the said reply which was on record, the competent authority has passed the dismissal order. Therefore also, the order of dismissal is liable to be set aside.

Looking to the facts and circumstances of the present case which are on record whether this Court have power of judicial review under Article 226 of the Constitution of India to interfere with the punishment of dismissal or not. The said question has been examined by the Apex Court in reported decision J.T. 1995 (8) SC Page 65 in the case of B.C.Chaturvedi Vs. Union of India & Others. That Hon'ble Apex Court held in Para (18) as under:-

"18. A review of the above legal position

would establish that the disciplinary authority, and on appeal the appellate authority, being fact -finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punihment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority schocks the conscience of the High Court/Tribunal. It would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons thereof."

In the said decision concurring reasons given by Per B.L.Hansaria, J on the very same question which are useful to note the follwoing observations and therefore said observations were quoted as under. The relevant portion of observations referred in Para 21 to 26 are as under:-

"21. I am in respectful agreement with all the conclusions reached by learned brother Ramaswamy, J.This concurring note is to express my view on two facets the case. The first of these relates to the power of the High Court to do "complete justice", which power has been invoked in some cases by this Court to alter the punishment/penalty where the one awarded has been regarded as disproportionate, but dened to the High Courts. No doubt, Article 142 of the Constitution has specifically conferred the power of doing complete justice on this Court, to achieve which result it may pass such decree or order as deemed necessary; it would be wrong to think that other courts are not to do complete justice between the parties. If the power of modification of punishment/penalty were to be available to this Court only under Article 142, a very large percentage of litigants would be denied this small relief merely because they are not in a position to approach this Court, which may, inter alia, be because of the poverty of the concerned person. It may be remembered that the framers of the Constitution permitted the High courts to even strike down a parliamentary enactment, on such a case being made out and we have hesitated to

concede the power of even substituting a punishment/penalty, on such a case being made out. What a difference? May it be pointed out that Service Tribunals too, set up with the aid of Article 232-A have the power of striking down a legislative act.

22. The aforesaid has, therefore, to be avoided and I have no doubt that a High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief,which power it undoubtedly has, in view of long line of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law. It may, however, be stated that this power of moulding relief in cases of the present nature can be invoked by a High Court only when the punishment/penalty awarded shocks the judicial conscience.

23. It deserves to be pointed out that the mere fact that there is no provision parallel to article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh's case, AIR 1963 SC, 1909, that the High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide which this Court has under Article 141. That, however, , is a different matter.

24. What has been stated above may be buttressed by putting the matter a little differently. The same is that in a case of dismissal, Article 21 gets attracted. And, in view of the inter-dependence of fundamental rights, which concepts was first accepted in the case commonly known as Bank Nationalisation case, 1970 (3) SCR 530, which thinking was extended to cases attracting Article 21 in Maneka Gandhi V. Union of India, AIR 1978 SC 597, the punishment/penalty awarded has to be reasonable; and if it be unreasonable, Article 14 would be violated. That Article 14 gets attracted in a case of disproportionate punishment was the view of this Court in Bhagat Ram v. State of Himachal Pradesh, 1983 (2) SCC 422 also. Now if Article 14 were to be violated, it

cannot be doubted that a High Court can take care of the same by substituting, in appropriate cases, a punishment deemed reasonably by it.

25. No doubt, while exercising power under Article 226 of the Constitution, the High Courts have to bear in mind the restraints inherent in exercising power of judicial review. It is because of this that substitution of High Court's view regarding appropriate punishment is not permissible. But for this constraint, I would have thought that the law makers do desire application of judicial mind to the question of even proportionality of punishment/penalty. I have said so because the Industrial Disputes Act, 1947 was amended to insert section 11A in it to confer this power even on a Labour Court/Industrial Tribunal. It may be that the power was conferred on these adjudicating authorities because of the prevalence of unfair labour practice or victimisation by the management. Even so, the power under Section 11A is available to be exercised, even if there be no victimisation or taking recourse to unfair labour practice in this background, I do not think if we would be justified in giving much weight to the decision of the employer on the question of appropriate punishment in service matters relating to Government employees or employees of the public corporations. I have said so because of need for maintenance of office discipline be the reason of our adopting a strict attitude qua the public servants, discipline has to be maintained in the industrial sector also. The availability of appeal etc. to public servants does not make a real difference, as the appellate/revisional authority is known to have taken a different view on the question of sentence only rarely. I would, therefore, think that but for the self-imposed limitation while exercising power under Article 226 of the Constitution, there is no inherent reason to disallow application of judicial mind to the question of proportionality of punishment/penalty. But then, while seized with the question as a writ court interference is permissible only when the punishment/penalty is shockingly disproportionate."

26. I had expressed my unhappiness qua the first facet of the case, as Chief Justice of the Orissa High Court in paras 20 and 21 of Kishna chandra v. Union of India, AIR 1992 Orissa 261 (FB), by asking why the power of doing complete justice has been denied to the High Court? I feel happy that I have been able to state as a Judge of the Apex Court, that the High Courts too are to do complete justice. This is also the result of what has

been held in the leading judgement".

After considering the view taken by the Apex Court in above cited decision and also considering the facts of the present case that the petitioner has been dismissed from service for remaining 2 days absent in a period of 2 months due to unavoidable circumstances and attended on duty late by 40 minutes on 15.12.86 and having 5 years service of the petitioner and also considering the reply of show cause notice wherein a detailed explanation and compelling circumstances for committing misconduct has been narrated which is found to be natural and true and therefore the punishment of dismissal imposed by the Competent Authority which shocks the judicial conscience of this Court that in such case punishment of dismissal is unwarranted and this Court have power in such situation to take care of the same by substituting a punishment deemed reasonable by it. If apparently the punishment which has been imposed by the Competent Authority if be unreasonable then Article 14 would be violated and therefore according to my opinion and considering the various decisions on the said questions, the punishment of dismissal is shockingly disproportionate and also shocks the judicial conscience of this Court.

10. In view of the various decisions of this Court and the Apex Court, the punishment of dismissal imposed by the Competent Authority for remaining absent for 2 days in 2 months and not to report in time and reported 40 minutes late of 15.12.1986. The punishment of dismissal is shockingly disproportionate which shocks the conscience of the Court that in such circumstances, the punishment of dismissal is out of proportionate. It is a duty of the competent authority before imposing the penalty upon any employee to consider the socio-economic family background of the employee, length of service, compelling circumstances for committing misconduct and past record of the employee concerned and other relevant factors. In the present case, the competent authority has not considered the explanation given by the petitioner in reply of the show cause notice Annexure E Page 38 before imposing the final punishment order against the petitioner. NO doubt that competent authority has mentioned in the final order that the petitioner had submitted a reply to the show cause notice but the detailed explanation and defence which was narrated in the reply was not at all considered and Competent Authority has not applied its mind in respect to the facts stated by the petitioner in his reply to the show cause notice. Therefore the order of punishment

passed by the respondent authorities dated 26.6.1987 is shockingly disproportionate and shocks the conscience of the Court and it is harsh and unjustified, arbitrary order passed by the Authority. Therefore, the same is required to be quashed and set aside.

11. Learned Advocate appearing on behalf of the petitioner has fairly submitted to this Court that the petitioner who is without job from the date of dismissal and he is aged about 43 years old and at present he is not working anywhere and he is interested in the job. He further submitted that the question of backwages or consequential relief is left to the Court. Ld. Advocate Shri V.M.Pancholi has submitted on behalf of the respondent that from the date of dismissal dated 26.6.87 almost 12 years have passed and it cannot be presumed in absence of evidence that the petitioner remained without work, job and income. Otherwise the petitioner was not able to maintain his family and not survive during this period. Therefore something has to be presumed that the petitioner must have earned and maintained his family and therefore Mr.Pancholi submitted that no back wages shall be granted to the petitioner for the intervening period. Ld. Advocate Shri Pancholi has also submitted that misconduct are found to be proved against the petitioner and for that misconduct some punishment must have to be imposed by this Court. Not only that but in the past 2 occasions, the petitioner had committed misconduct and Competent Authority has imposed punishment and that fact is also required to be kept in mind while passing the order in respect to the back wages and other consequential benefits.

12. I have considered submissions of both the advocates in respect to the fact that what relief the petitioner is entitled in respect to back wages and consequential benefits. The submission of Mr.Pancholi is also required to be kept in mind that a misconduct which was alleged against the petitioner and found to be proved by the Inquiry Officer that part has not been disputed by the petitioner because there was an exparte inquiry and 4 witnesses were examined by the Inquiry Officer and therefore the present misconduct mentioned in the chargesheet dated 6.2.87 are already proved against the petitioner but because of considering the gravity of misconduct and punishment if the Court is interfering in respect to the punishment then interalia some punishment must have to be imposed by this Court while exercising powers under Article 226 of the Constitution of India. I am aware about the fact that this Court having very limited powers to interfere with the punishment while

exercising powers under Article 226 of the Constitution of India. But after perusing the entire record, misconduct and explanation tendered by the petitioner by way of reply of the show cause notice, I am of the view that the said punishment considering the decision of this Court and the Apex Court is shockingly disproportionate and shocks the conscience of the court that in such circumstances, the punishment of dismissal has been passed by the Competent Authority without considering the reply tendered by the petitioner is unjustified, unreasonable and arbitrary. Therefore, considering the overall facts and circumstances of the present case and also considering the total service of 5 years, past 2 punishments imposed by the authority to the petitioner and present misconduct which is found to be proved, it is in the interest of justice to deny 75% backwages by way of punishment to the petitioner for the intervening period and to grant 25% backwages for the intervening period with a punishment of stoppage of 1 increment with cumulative effect for the misconduct which has been committed and found to be proved against the petitioner which would meet the ends of justice.

13. In view of the above observations and conclusions, the punishment of dismissal (Annexure F Pg.43) dated 26.6.87 passed by the Competent Authority and order of the Appellate Authority dated 10.2.88 (Annexure G Page 46) is required to be quashed and set aside & it is directed to the respondents to reinstate the petitioner in his service with continuity of service to pay 25% back wages of intervening period from the date of dismissal the date of reinstatement with all consequential service benefits as if the petitioner was deemed to be in service during this intervening period for all purpose. It is further directed to the respondents to reinstate the petitioner in service within a period of six weeks from the date of receiving certified copy of this order and to pay 25% back wages fo the intervening period as directed above within a period of three months from the date of receipt of certified copy of this order and respondents impose a punishment of stoppage of one increment with cumulative effect to the petitioner. Therefore, the present petition is partly allowed. Rule made absolute to that extent. Considering the facts of this case, there shall be no order as to costs.

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